IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 34688

ROJELIO ROY ALVAREZ,	)	**2009 Unpublished Opinion No. 471**
	)	
Petitioner-Appellant,	)	**Filed: May 21, 2009**
	)	
v.	)	**Stephen W. Kenyon, Clerk**
	)	
STATE OF IDAHO,	)	**THIS IS AN UNPUBLISHED**
	)	**OPINION AND SHALL NOT**
Respondent.	)	**BE CITED AS AUTHORITY**
	)	

Appeal from the District Court of the Sixth Judicial District, State of Idaho, Bannock County. Hon. Peter D. McDermott, District Judge.

Order summarily dismissing action for post-conviction relief, affirmed.

Rojelio R. Alvarez, Boise, pro se appellant.

Hon. Lawrence G. Wasden, Attorney General; Jennifer E. Birken, Deputy Attorney General, Boise, for respondent.

LANSING, Chief Judge

Rojelio Roy Alvarez appeals pro se from the district court's summary dismissal of his petition for post-conviction relief. Because the current basis for post-conviction relief that he argues on appeal was never presented to the trial court, we affirm.

I.
BACKGROUND

Alvarez engaged in a physical altercation with his live-in girlfriend in early 2000 and was arrested as a result. He was ultimately found guilty of felony domestic battery in the presence of a child, Idaho Code § 18-918. Alvarez's attorney filed a motion for a new trial, and Alvarez followed up with a handwritten motion of his own. The district court held a hearing on the motion during which both Alvarez and his attorney addressed the court, but the court ultimately denied the motion. Though an appeal was filed in the criminal case, the denial of that motion was not one of the issues raised on appeal. This Court affirmed the district court on direct appeal. *See State v. Alvarez*, 138 Idaho 747, 69 P.3d 167 (Ct. App. 2003).

Alvarez later filed a petition for post-conviction relief, which was summarily dismissed. Alvarez appealed the summary dismissal, and this Court affirmed in part, reversed in part, and remanded for additional proceedings. *See Alvarez v. State*, Docket No. 31338 (Ct. App. Sept. 19, 2006) (unpublished). Upon remand, Alvarez submitted an amended petition for post-conviction relief adding two new claims, including one for ineffective assistance of counsel based on the fact that the denial of the motion for a new trial had not been appealed.[1] The district court ultimately dismissed the amended petition. Alvarez now appeals again.

II.
ANALYSIS

Alvarez argues on appeal that his attorneys in the criminal case, either in the district court proceedings or on appeal, were ineffective because they did not object to an erroneous jury instruction and/or argue it as a basis for a new trial, and/or challenge it on appeal. A claim of ineffective assistance of counsel may properly be brought in a post-conviction action. *Parrott v. State*, 117 Idaho 272, 274, 787 P.2d 258, 260 (1990); *Self v. State*, 145 Idaho 578, 580, 181 P.3d 504, 506 (Ct. App. 2007); *Brown v. State*, 137 Idaho 529, 533, 50 P.3d 1024, 1028 (Ct. App. 2002). Such actions are civil in nature and are governed by the Idaho Rules of Civil Procedure. *Pizzuto v. State*, 127 Idaho 469, 470, 903 P.2d 58, 59 (1995); *Mata v. State*, 124 Idaho 588, 591, 861 P.2d 1253, 1256 (Ct. App. 1993). An action for post-conviction relief may be summarily dismissed, either on the State's motion or upon the court's own initiative, if the applicant's evidence has raised no genuine issue of material fact which, if resolved in the applicant's favor, would entitle him to the requested relief. I.C. § 19-4906; *Medrano v. State*, 127 Idaho 639, 642-43, 903 P.2d 1336, 1339-40 (Ct. App. 1995); *Gonzales v. State*, 120 Idaho 759, 761, 819 P.2d 1159, 1161 (Ct. App. 1991). On appeal from the summary dismissal of an application for post-conviction relief, the inquiry is whether the application, affidavits, or other evidence supporting the application allege facts which, if true, would entitle the applicant to relief. *Parrott*, 117 Idaho at 274, 787 P.2d at 260; *Roman v. State*, 125 Idaho 644, 647, 873 P.2d 898, 901 (Ct. App. 1994); *Whitehawk v. State*, 116 Idaho 831, 833, 780 P.2d 153, 155 (Ct. App. 1989). If such a

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[1] The State does not appear to have objected to this amendment below and explicitly declines to take a position on appeal as to its propriety.

factual issue is raised, an evidentiary hearing must be held. *Gonzales*, 120 Idaho at 763, 819 P.2d at 1163; *Ramirez v. State*, 113 Idaho 87, 88, 741 P.2d 374, 375 (Ct. App. 1987).

Alvarez argues that a specific jury instruction used in his trial, Jury Instruction 10, was confusing and misleading and did not adequately state the applicable law.[2] His argument is based on the assertion that the jury instruction's use of the words "willfully" and "unlawfully" was confusing to the jury and diminished the State's burden of proof on the mental element of the offense. Alvarez states that this Court reached such a conclusion under similar circumstances in *State v. Sohm*, 140 Idaho 458, 460-61, 95 P.3d 76, 78-79 (Ct. App. 2004), and *State v. Lilly*, 142 Idaho 70, 71-72 122 P.3d 1170, 1171-72 (Ct. App. 2005), where we considered jury instructions stemming from a similar version of I.C. § 18-918(3),[3] specifically considering the instructions' use of the words "willfully" and "unlawfully" and the resulting impact on the State's burden of proof. Alvarez appears to assert that his current "willfully and unlawfully" argument should have been the basis for a new trial and that his defense counsel was ineffective for not pursuing that basis through argument on the motion for a new trial, through appeal of the denied motion, or through some other appropriate action.

We do not address the merits of Alvarez's appellate argument, however, because his argument concerning this alleged error in the jury instruction is raised for the first time in this appeal. It was not the basis for any of his claims in either his original post-conviction petition or

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[2] Jury Instruction 10 states:

> In order for the defendant to be guilty of Domestic Battery, the state must prove each of the following:
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> (1) On or about February 23, 2000
> (2) in the state of Idaho
> (3) the defendant, ROJELIO R. ALVAREZ, willfully and unlawfully,
> (4) inflicted a traumatic injury upon another household member, Joann Hakes,
> (5) in the presence of a child.
>
> If each of the above has been proven beyond a reasonable doubt, you must find the defendant guilty. If any of the above has not been proven beyond a reasonable doubt, then you must find the defendant not guilty.

[3] At the time Alvarez committed his crime, I.C. § 18-918(3) stated: "Any household member who willfully inflicts a traumatic injury upon any other household member is guilty of a felony." The version of I.C. § 18-918(3) considered in *Sohm* and *Lilly* differed somewhat from that applied in Alvarez's case and has subsequently been again amended.

his amended petition. If an appellant has not raised a claim below, we do not address it for the first time on appeal. *Pizzuto v. State*, 146 Idaho 720, 735, 202 P.3d 642, 657 (2008); *Porter v. State*, 136 Idaho 257, 262, 32 P.3d 151, 156 (2001); *Fairchild v. State*, 128 Idaho 311, 318, 912 P.2d 679, 686 (Ct. App. 1996). Though Alvarez did assert in his amended petition that his attorney's failure to appeal the court's denial of the motion for a new trial constituted ineffective assistance of counsel, this is the first time he has raised the "willfully and unlawfully" language in the jury instruction as a factual basis for the ineffective assistance claim, or for any claim at all. As a result, whatever the merit of his "willfully and unlawfully" argument may or may not be, we are unable to consider it on appeal.

III.
CONCLUSION

Since the "willfully and unlawfully" language in a jury instruction is the sole factual basis for Alvarez's claim of error, and since it was not the basis for his claims below, we affirm the district court's summary dismissal of Alvarez's petition for post-conviction relief.

Judge PERRY and Judge GUTIERREZ **CONCUR.**